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The common thread in the Memorandum of Understanding, the DeConcini Bill, and the revised Restatement, Foreign Relations Law of the United States is that of reasonableness, in a jurisdictional sense. For reasonableness, one might substitute the word reality — they reflect the accommodations necessary when one sovereign attempts to project its authority or law into the space, territorial or commercial, claimed by another sovereign.

The Memorandum of Understanding between Canada and the United States is a remarkable example of an attempt to deal with the problems of conflicting jurisdiction in the antitrust field. It is one of three such agreements by the United States, the others being a 1982 agreement with Australia, and a 1984 agreement with Germany.

This agreement between Canada and the United States comes after decades of controversy which has characterized relations between our two countries in the antitrust field. Such controversy includes the 1947 pulp and paper dispute between the United States and Canada, when the Justice Department's attempt to subpoena documents and records led to the passage of the first Canadian Business Records Protection Act. There was also the 1958 Canadian radio patent case, the 1970s disputes on uranium and potash, and other instances where Canadian courts refused to honor U.S. requests for discovery of documents related to antitrust matters.

The 1984 Memorandum of Understanding between the two countries set up a procedure for notification, consultation and cooperation. Notification is to occur whenever one of the countries plans an antitrust investigation involving significant national interests of the other country or discovery of documents or other evidence located within the other country. The parties agreed in the Memorandum of Understanding on cooperation and good faith consideration of the national interests of the other country to avoid or minimize conflicts.

In addition, a procedural hierarchy was established for discovery in such cases. The parties agreed to first seek documents within their own territory. If those documents were not available, only then would they seek documents in the other party's country. The documents would first be sought by voluntary means and then as a last resort by means of com-

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pulsory process in which the request would be framed as narrowly as possible. In private suits, each party agrees to inform the court of how the national interests of the other may be implicated by the suit.

Since that Memorandum of Understanding, an important event has been the enactment by Canada of its 1986 Competition Act. There has been a tremendous convergence in terms of substantive antitrust provisions between the laws of the two countries, certainly a much greater convergence than had existed under the Canadian Combines Act and previous laws.

Although the Canadian antitrust law differs from the Sherman Act jurisdictionally in the very important aspect that it excludes foreign commerce, there are a number of very similar provisions. For instance, in the evaluation of mergers, both laws consider relevant whether or not the proposed merger is likely to bring about a significant increase in exports or a significant substitution of domestic products for imported goods. In the field of export controls, both laws (the U.S. antitrust laws through the Webb-Pomerene Act and the Export Trading Company Act, and the Canadian Competition Act because of a specific provision in section 324) exclude exports from their coverage. In the field of extraterritorial discovery, section 9(2) of the Competition Act expressly authorizes the Canadian court to order a defendant corporation to produce records from its parent or subsidiary, even if located outside Canada. Thus the differences between the laws of the two countries come not so much from the substantive provisions of those laws as in their differing application.

The Memorandum of Understanding represents real progress, given the past history of disagreements between the two countries in the antitrust field. It is an advanced example of a worldwide effort by government to resolve such disputes by the application of the jurisdictional principle of reasonableness.

The Organization for Economic Cooperation and Development ("OECD") in 1984, by consensus, adopted an approach of moderation and restraint to avoid and minimize conflicting requirements in extraterritorial application of laws, including competition laws. That consensus stated in its essential part: "The member countries concerned should . . . endeavor to avoid or minimize such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other member countries."[1]

The OECD Committee on International Investment and Multinational Enterprises published a report in 1987 called *MINIMIZING CONFLICTING REQUIREMENTS: APPROACHES OF "MODERATION AND RESTRAINT."*[2] This report is very interesting and a very valuable litigation tool because it summarizes and quotes the positions of the various

[1] OECD, THE 1984 REVIEW OF THE 1976 DECLARATION AND DECISIONS 26 (1984).

[2] OECD CIME, MINIMIZING CONFLICTING REQUIREMENTS: APPROACHES OF "MODERATION AND RESTRAINT" (1987).

governments on moderation and restraint in extraterritorial application of their law.

There are a number of very revealing exchanges between the United States and Canada as to their respective understandings of what this approach entails. For instance, on whether this principle of jurisdictional reasonableness is a principle of international law or simply one of comity, the OECD report notes that Canada expressed the view that moderation and restraint is an approach based on principles or rules of international law with respect to jurisdiction, requiring each state to respect the sovereignty of every other state. The report notes that moderation and restraint is essentially a binding legal obligation. The United States, on the other hand, is quoted as espousing the view that "moderation and restraint is not an approach of international law and imposes no mandatory legal obligation."

In terms of the judicial construction of legislation or regulation to avoid extraterritoriality, the Canadian authorities reported that their courts ensure that there is no extraterritorial effect on the sovereign interests of another state. The U.S. statement is that the choice of law which results is not generally compelled by international law, and in general, counters the position of Canada.

On the discovery of documents, the Canadian delegation commented that their courts would refrain from requiring discovery abroad where compliance would constitute a breach of law in the other state. The U.S. authorities commented that the necessity for document discovery cannot be territorially contained. Obviously, there is a marked difference in the positions of the two countries on the application of the principles of moderation and restraint and of jurisdictional reasonableness.

Section 403(1) of the revised Restatement, Foreign Relations Law of the United States provides that a state may not exercise jurisdiction over activities or persons having connections with another state or states "when the exercise of such jurisdiction is unreasonable." In addition, section 403(3) provides that where more than one state has a reasonable basis for jurisdiction, each state is expected to evaluate the respective interests in its exercise of jurisdiction and defer to the other state if that state's interest is greater.

The Antitrust Division's position on the principle of reasonableness is a bit difficult to understand. In an October 1987 speech before the Foreign Corporate Law Institute, Antitrust Chief Charles Rule stated that the principle of reasonableness should govern the assertion of jurisdiction only in private suits, not in government suits. The reason advanced was that the executive branch is more competent to consider a wider variety of foreign relations factors than are the courts. Therefore, since the executive branch has already considered those factors in exercising its discretion, the courts should not be permitted to second guess the decision. This position is alarmingly reminiscent of the medieval

view that "the king can do no wrong." Its error is further compounded by the Antitrust Division's concurrent insistance that the foreign sovereign compulsion defense also applies only in private suits and not in government suits for essentially the same reason.

Where do we go from here?

The dispute settlement provisions contained in the proposed Canada-U.S. Free Trade Agreement may point us in the right direction. In general, the Free Trade Agreement provides for dispute settlement through consultation, mediation, consensus, arbitration in some circumstances, and fact finding. These would all be under the auspices of the Canada-U.S. Trade Commission, which would deal with disputes, interpret the Free Trade Agreement, and decide whether or not an actual or proposed measure is consistent with its provisions. The Free Trade Agreement also provides for special bi-national panels for disputes over anti-dumping and countervailing duty legislation.

Consider how those methods of dispute resolution might be applied, at least, in part to jurisdictional differences between the two countries in the antitrust field. The United States and Canada might establish a commission similar to the Canada-U.S. Trade Commission under the Free Trade Agreement to settle such disputes arising under the antitrust laws.

The commission would have the power to establish panels of experts. The commission or, in case of disagreement, the panels could be charged with determining whether or not assertions of jurisdiction in both public and private suits are consistent with the principle of moderation and restraint recommended by the OECD. The findings of the commission, or such panels, could be either non-binding or binding, but if non-binding, would at least be recommended by each government to its national courts or agencies in both public and private suits.

Such a bi-national commission could easily be expanded into a multinational dispute resolution facility under the auspices of the OECD, serving all of those countries willing to seek such settlements.

The United States and Canada are the two largest trading partners in the world. It would be a tremendous step forward if they were to utilize the example of the dispute settlement provisions of the Free Trade Agreement to resolve their long-standing antitrust differences.